IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-378

JAMES BROCKINGTON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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Statement of the Case

Petitioner seeks a writ of certiorari to review judgments entered in the Appellate Division of the Superior Court of New Jersey on March 16, 1976, affirming peti-

tioner's conviction and sentencing conducted by the Law Division of the Superior Court of New Jersey. (The Appellate Division decision is reported at 140 N.J.Super 422 (App.Div.1976), 356 A.2d 430).

On June 15, 1976, the Supreme Court of New Jersey denied certification.

Petitioner was originally charged in a four count indictment with conspiracy to violate the narcotics law of New Jersey (N.J.S.A. 24:21-24); distribution of cocaine, (N.J.S.A. 24:21-19(a)(1)); possession of cocaine, (N.J.S.A. 24:21-20); and possession of cocaine with intent to distribute, (N.J.S.A. 24:21-19). At a retraxit hearing on September 11, 1974, petitioner pleaded guilty to Count 2, distribution of cocaine, in return for the State's recommendation for dismissal of the other three counts. At the time the plea was accepted by the Honorable Bruno L. Leopizzi, J.S.C., the State, the petitioner, and the Court were all apparently under the impression that the maximum time petitioner could be sentenced to was twelve years (TP6-12 to 25).*

However, on December 17, 1974, Judge Leopizzi sentenced the petitioner to a term of eighteen to twenty years (TS9-2 to 4).

On January 24, 1975, petitioner moved before Judge McGlynn** for a reduction of sentence. The Court concluded that in light of the fact that petitioner had been told at the time he entered his plea of guilty that the maximum sentence that could be imposed was twelve years, he would be given the opportunity to withdraw his guilty plea and stand trial (TM2-1 to 10). However, defense counsel rejected this opportunity and demanded that petitioner be resentenced to no more than the twelve year maximum. The Court refused, noting that the sentencing judge had the right to reject a plea bargain, and in light of petitioner's previous criminal record, the Court found it would be in the interest of justice to sentence petitioner under the Multiple Offender Statute if he pleaded guilty or pleaded not guilty and was convicted after a trial. Sentencing was then deferred by Judge McGlynn until February 13, 1975.

On February 13, 1975, the State reaffirmed its position that petitioner should be sentenced to the maximum term provided by law. The State did not recommend that the Court proceed under the Multiple Offender Statute but Judge McGlynn proceeded under his discretion as sentencing judge. The Court again offered petitioner the opportunity to withdraw his plea of guilty. The petitioner rejected this offer but objected to being sentenced as an habitual offender. Judge Leopizzi's sentence was then set aside by Judge McGlynn (TPH27-21 to TPH28-25).

On March 18, 1975, petitioner was tried under an accusation which charged the defendant with being a second offender. The defendant waived his right to a jury trial. Judge McGlynn found the defendant guilty and imposed a sentence of eighteen to twenty years in the New Jersey State Prison (TSH36-3 to 7).

On appeal the Superior Court, Appellate Division, affirmed the conviction and sentence on March 16, 1976. On June 15, 1976, the Supreme Court of New Jersey denied petitioner's petition for certification.

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* "TP" refers to transcript of original plea, September 11, 1974. "TS" refers to transcript of original sentencing, December 17, 1974. "TM" refers to transcript of motion to reduce sentence, January 24, 1975. "TPH" refers to transcript of proceedings, February 13, 1975. "TSH" refers to transcript of accusation trial and sentence, March 18, 1975.

** Judge Leopizzi had been transferred to Passaic County.

REASONS FOR DENYING THIS WRIT

POINT ONE

The federal question presented herein was either not presented below or was not properly presented below.

It is essential to the jurisdiction of this Court under 28 U.S.C. §1257 that a substantial federal question has been properly raised in the state court proceeding below. See Wiener, "Wanna Make a Federal Case Out of It?" 48 A.B.A.J. 59, 60-61 (1962). There are two basic requirements of particularity in the proper framing of a federal question. First, the question must make reference to a particular clause of the federal Constitution relied upon, as well as the rights claimed thereunder. Second, the jurisdiction of this Court cannot arise from mere inference but only from averments so distinct and positive as to place it beyond question that a party intended to assert a federal right. *Oxley Stove Company* v. *Butler County,* 166 U.S. 648, 655 (1897). The question petitioner attempts to raise has not met these standards.

At no point at the trial level did petitioner assert any federal grounds for specific performance of his plea bargain. "Due process" was never mentioned; neither were any specific references made to the United States Constitution and petitioner's rights thereunder. The Superior Court, Appellate Division, affirmed the conviction on state law grounds; the state courts did not touch on federal issues which were not raised by petitioner until he petitioned this Court for a Writ of Certiorari. Thus, petitioner's claim comes too late. "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is

not discretionary but jurisdictional". *Amalgamated Food Employees Union* v. *Logan Valley,* 391 U.S. 308, 334 (1968) (dissent). As Rule 23(1)(f) of this Court states, a petitioner seeking review of a state court decision must "specify the stage of the proceedings in the court of the first instance and in the appellate court at which, and the manner in which the federal questions sought to be reviewed were raised . . ." At no place in his Petition does petitioner make such a specification.

POINT TWO

The decisions below were predicated on the well established principle that the sentencing judge is not bound by plea agreements between the prosecutor and defense counsel, and where the sentencing judge gave petitioner the opportunity to withdraw his guilty plea after refusing to enforce the plea bargain, petitioner's rights to due process under the Fourteenth and Sixth Amendments were not violated.

The petitioner asserts that he is entitled to specific performance of the terms of a plea agreement which he claims was entered into by defense counsel and the prosecutor. This claim is made in spite of the fact that Judge McGlynn offered petitioner the opportunity to withdraw his guilty plea on several occasions, prior to sentencing. Petitioner insisted below and continues to insist that, because Judge Leopizzi stated that the maximum sentence to be imposed would be twelve years at the taking of the plea of guilty, he acquired a vested right to have his guilty plea accepted with the proviso that his sentence not exceed twelve years.

The State recognizes that "the terms and conditions of a plea bargain must be meticulously carried out," *State* v. *Jones*, 66 N.J. 524, 525-526 (1975), 333 A.2d 529, 530-531, and that a defendant's reasonable expectations engendered by a plea bargain have been accorded considerable deference. See *State* v. *Thomas*, 61 N.J. 314, 323-324 (1972), 294 A.2d 57, 61-62; *State* v. *Poli*, 112 N.J. Super. 374, 380 (App. Div. 1970), 271 A.2d 447, 450. However, the State submits that there are significant policy considerations which operate to preclude a defendant from insisting that he has a right to a particular term of years merely because the judge at the taking of the plea indicated that a specific term of years was the maximum sentence to which defendant was exposed. Furthermore, the decision rendered by the Superior Court, Appellate Division, conforms to the applicable decisions of this Court in regard to due process in the area of plea agreements.

Initially, it should be noted that this case does not involve a breach of a plea bargain by the State. Unlike the prosecutor in *Santobello* v. *New York*, 404 U.S. 257 (1971), the State did not agree to make any recommendation as to the number of years to be imposed. On the contrary, the State consistently took the position that the petitioner should receive the maximum number of years provided by law. The petitioner was told originally by Judge Leopizzi that he would be exposed to a maximum of only twelve years. However, the State initiated no action which would subject the petitioner to treatment as a multiple offender. The State was as surprised as the petitioner to hear Judge Leopizzi's sentence of eighteen to twenty years. The sentence imposed by Judge Leopizzi was illegal; it was a nullity, and for all intents and purposes Judge McGlynn was sitting as the sentencing judge when petitioner moved to have his sentence reduced. The State submits that Judge McGlynn, at this juncture in

the proceedings, had the power to accept or reject any plea. In the exercise of his discretion he determined that the petitioner should be treated as a multiple offender, and, because petitioner had not been advised of this possibility when he entered his plea of guilty before Judge Leopizzi, Judge McGlynn offered the petitioner the opportunity to withdraw his plea. Petitioner refused to accept this offer, arguing that Judge McGlynn was bound by Judge Leopizzi's statement at the taking of the plea to the effect that petitioner's maximum exposure was twelve years.

This Court has stated on several occasions that there is no right to have a guilty plea accepted, and a court in the exercise of its sound discretion may reject such a plea. *Santobello* v. *New York*, *supra*, 404 U.S. at 262; *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962); *United States* v. *Jackson*, 390 U.S. 570, 584 (1968).

See also New Jersey Rules of Court, R. 3:9-3(d) which provides:

> If at the time of sentencing the judge determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel, the defendant shall be permitted to withdraw his plea.

As noted by the Ninth Circuit Court of Appeals, strong policy considerations favor this type of procedure:

> . . . a fundamental and essential element of the administration of criminal justice is that the judge will have the ultimate responsibility in passing sentences unfettered by improper influence and based upon his objective determination, guided by his wisdom and conscience. To shackle him with manda-

tory enforcement of agreements between counsel would result in a dangerous inroad in our system of justice. *United States* v. *Hernandez*, 471 F.2d 1209, 1210 (9th Cir. 1972).

According to petitioner, a sentencing judge would be foreclosed from rejecting a plea bargain even where the judge has discovered after accepting the plea that the defendant has had prior involvement with the criminal law. Thus, a defendant by entering a guilty plea could effectively insulate himself from treatment under a multiple offender statute. The State submits that this is not only contrary to the well-settled principle that sentencing falls within the judge's discretion, but also frustrates the legislative policy embodied in the multiple offender statutes.

Petitioner asserts that the Superior Court, Appellate Division's decision runs counter to this Court's decision in *Santobello* v. *New York, supra.* However, a closer reading of that case finds both courts in agreement on the principles of due process with regard to plea agreement procedures. In *Santobello,* the defendant pleaded guilty to one count on the district attorney's promise that he would make no sentence recommendation. At sentencing a new district attorney asked that the maximum sentence be imposed, and the sentencing judge imposed such a sentence, in disregard of the earlier plea agreement. Moreover, the sentencing judge refused to allow the defendant to withdraw his guilty plea. This court vacated the sentence and remanded the case back to the State court to determine whether in those circumstances defendant should be allowed to withdraw his plea or whether the court should simply resentence him with no recommendation from the State. In vacating that sentence, this court reaffirmed that a sentencing judge may reject a plea bargain. Under the circumstances of *Santobello,* however, the plea agreement was breached by the State, and the sentencing judge did not give the defendant the opportunity to withdraw his plea. In the instant case Judge Leopizzi, on his own initiative, sentenced petitioner illegally. That sentence was voided by Judge McGlynn, who, exercising his proper discretion, rejected the original plea agreement and gave petitioner the opportunity to withdraw his plea.

The instant case is analogous to *People* v. *Selikoff*, 41 A.D. 2d 376, 343 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974) *cert.* den. 419 U.S. 1122 (1975). In that case defendant pleaded guilty to grand larceny and obscenity on the Court's opinion that no incarceration would be necessary. However, at sentencing, the judge informed the defendant that because of information he had received he could no longer in the interest of justice, abide by the agreement. The judge offered defendant an opportunity to withdraw his plea. Defendant's counsel refused this offer, and demanded specific performance of the court's promise of no incarceration. The court thereupon imposed a five year sentence on the grand larceny plea and a fine on the obscenity plea. In affirming the conviction the Appellate Division of the Supreme Court of New York stated . . . "there cannot be an absolute sentence promise by the court at the time of acceptance of a guilty plea, as that would violate a statutory mandate and a public policy" . . . "If the Court has in fact made a specific sentence promise to a defendant at the time of a guilty plea which it cannot thereafter fulfill, it is perfectly fair and proper for the court to offer the defendant the opportunity to withdraw his plea, as was done at bar and restore him to his prior position."

In *People* v. *Johnson*, 10 Cal. 3d 868, 112 Cal. Rptr. 556, 519 P.2d 604 (1974), the California Supreme Court held that the failure to advise the defendant of his right

to withdraw his guilty plea constituted error, when the trial judge rejected a plea agreement at sentencing. The California Supreme Court refused to order specific enforcement of the original plea bargain, noting:

> . . . "The instant case, involving serious misrepresentations by the defendant, reinforces our reluctance to create a right to specific performance of a plea bargain whenever the court has failed to advise a defendant of his right under (Calif. Penal Code) section 1192.5. We think it is sufficient, in such a case, to require the court to provide defendant with an opportunity to withdraw his plea . . ." 519 P.2d at 607.

The State submits that the above cases are in line with this Court's decision in *Santobello* and the instant case. There is no conflict of decisions here which would merit the attention of this Court. There is no precedent on the federal or state level for specific performance of a plea bargain. It is deeply engrained in the jurisprudence of New Jersey that the sentencing decision lies within the sound discretion of the sentencing judge. The power and duty to sentence resides in the trial judge. *State* v. *Kaufman*, 18 N.J. 75, 83 (1955), 112 A. 2d 721, 725, and he is to act in the public interest in imposing sentence. *State* v. *Ivan*, 33 N.J. 197 (1960), 162 A.2d 851. To grant the petitioner the relief which he seeks would be to subvert the judicial prerogative and place the sentencing power in the hands of defense counsel and the prosecutor.

Petitioner's reliance on *State* v. *Thomas, supra*, and *State* v. *Poli, supra*, is misplaced. In the *Thomas* case, the defendant was charged with atrocious assault and battery, assault with intent to rob, and robbery. Pursuant to a plea bargain, the defendant pled guilty to

atrocious assault and battery in exchange for dismissal of the other charges. The defendant was sentenced to an indeterminate term. The victim of the atrocious assault and battery subsequently died and the defendant was indicted for murder some ten months after the sentence was imposed. While holding that it would not be a violation of the Double Jeopardy Clause to try the defendant for the murder of the victim, the Supreme Court of New Jersey ruled that the murder indictment should be dismissed under the circumstances of the case. The court stated: "It is . . . important to assure a defendant that *after the agreement has received final judicial sanction*, it will be carried out according to its terms." 294 A.2d at p.61 (emphasis added). The court found that by pleading guilty to the atrocious assault and battery charge, and by serving the sentence that was imposed, the defendant entertained a reasonable expectation that the incident was terminated and he "could not thereafter be called upon to account further." *Id.* at p.62. On the other hand, the State, by attempting to prosecute the defendant for murder was "doing violence to its agreement and [was] seeking to deprive the defendant of something for which he legitimately bargained." *Id.* Since the defendant had already served eighteen months of an indeterminate term and had been released from custody on parole, the Court concluded:

> To vacate the plea in this case would be unjust to the defendant who has already been punished for the crime to which he confessed. As to him the status quo cannot be resumed. *Id.* at p. 62;*Id.* at p. 324.

Unlike the situation presented in the *Thomas* case, the plea bargain in the instant case never received final ju-

dicial sanction. Judge Leopizzi certainly cannot be said to have accepted it, for he sentenced the petitioner to a term beyond its terms. Judge McGlynn expressly rejected it. Judge McGlynn did offer to put petitioner back to the status quo, but petitioner refused this offer. The fact that petitioner was incarcerated for eight weeks under the illegal sentence is not such a denial of "due process" that the status quo could not be returned to petitioner. Had Judge Leopizzi offered petitioner the right to withdraw his plea and had petitioner accepted, it is highly likely that Judge Leopizzi would have ordered incarceration, since petitioner had committed another crime while on bail pending sentencing (TS8-3 to 9). And since Judge McGlynn counted petitioner's pre-sentencing incarceration time in determining the sentence, petitioner suffered no substantial harm. The question presented does not involve a breach by the State of its agreement as in the *Thomas* case, but rather a judicial refusal to accept the bargain. The *Thomas* case expressly recognized the sentencing judge's power to reject a plea bargain. 294 A.2d. at p.61.

In *State* v. *Poli, supra*, the defendant pleaded guilty to five separate indictments charging him with obtaining money under false pretenses. The plea was made pursuant to an agreement between defense counsel and the judge that the sentence would run equally and concurrently to whatever sentence the defendant might receive on charges then pending in another county. A three to five year sentence on the charges pending in the other county was subsequently imposed. A different judge sentenced defendant to serve five to eight years on the five indictments. On appeal the Appellate Division of the Superior Court of New Jersey found that the defendant actually and in good faith did have a bona fide belief in

the agreement when he entered his guilty pleas and therefore the plea was not voluntarily entered. The Court modified the sentence to conform to the original plea. *Id.*

The State submits that the petitioner herein, unlike the defendant in *Poli,* did not in good faith entertain a reasonable expectation that his sentence would not exceed twelve years. The petitioner was aware or should have been aware that the judge would eventually be informed of his prior record when the judge received petitioner's pre-sentence report. In such a situation the most that can be said is that the petitioner entertained a hope that the judge, in his discretion, would not deem it advisable to have the petitioner treated as a multiple offender. The State submits that this was not a reasonable belief.

The record is unclear as to why petitioner's counsel did not object at the time Judge Leopizzi imposed his sentence. Nevertheless, his prompt motion for post-conviction relief and Judge McGlynn's voiding of the original sentence negates petitioner's claims of a denial of Sixth and Fourteenth Amendment rights. Petitioner was offered the opportunity to withdraw his plea and stand trial. His refusal does not entitle him to specific performance.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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